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SUPREME COURT, U. S.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 190.

MICHAEL J. VAIARELLA,
Petitioner,

v.

JAMES F. SHANAHAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS, ESSEX COUNTY.

BRIEF FOR RESPONDENT IN OPPOSITION.

SOLOMON SANDLER,
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Attorney for Respondent.

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Question Presented by Petitioner.

The petitioner presents, on pages 2 and 3 of his brief, a single question, to wit: Must a trial judge charge a jury that "assumption of the risk is no defense to the negligence of the defendant or the unseaworthiness of the defendant's vessel"?

In answer thereto, the defendant says that in his opinion there is no need for the trial judge to charge the jury in precisely the words requested if the judge duly states the defendant's duty under the negligence and unseaworthiness counts; in particular, if the judge charges the jury in such a manner as to indicate the absolute responsibility of the defendant and if the defendant has not pleaded "assumption of the risk" as an affirmative defense and has not brought up during the course of the trial defense of as-

sumption of the risk, then the trial judge need not charge the jury as requested.

Counter-Statement of the Facts.

Also, the main petitioner's statement of the facts is accurate except that there was no testimony that the lighting was "inadequate" as stated by the petitioner, nor was there testimony that the plaintiff "knew that the ladder was defective."

Argument.

During the trial judge's charge to the jury there was adequate coverage by which the jury could determine that the duty of the defendant to provide a seaworthy vessel was absolute. Further, the trial judge's charge explained fully the defendant-shipowner's duty in respect to supplying a safe ship.

In all respects the judge explained the positive obligations of the defendant-shipowner from which the jury could have determined the defendant's responsibilities.

Further, the trial judge explained in some detail the effect of the actions of the defendant so that there would be a mitigation of damages in the event the plaintiff recovered anything.

Plaintiff now contends that the explanation of the effect of the plaintiff's actions to mitigate damages should have contained the words "assumption of the risk" and the plaintiff now contends that, inasmuch as the trial judge's explanation did not contain these words, then the jury was probably mistaken as to the effect of the knowledge of the condition of the ship on the seaman's right to recovery.

In this aspect defendant relies on the opinion of the Massachusetts Supreme Judicial Court which is part of

the record of the petition submitted by the petitioner, which says, "we think it is tenuous to suggest that the jury, knowing that the seaman had no choice but to take the ship as he found it, could, contrary, in effect, to the instructions given, find that he was negligent and barred from recovery on a ship that turned out to have a defective companionway."

In *Clark* v. *Pennsylvania Railroad Co.*, 328 F. 2d 591, 591-596 (2d Cir.), the Court said substantially the same thing.

However, in *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir.), the Court did say that reference to assumption of the risk would have been proper. But, in that case, the circumstances suggested that, unless the reference to assumption of the risk was made, the jury "might have thought the duty to provide a seaworthy vessel was less than absolute." This was merely to clarify the positive obligation of the shipowner to provide a seaworthy or safe ship, and not to elaborate on the owner's defenses.

The defendant respectfully submits that, wherever a Court of Appeals has suggested that the trial Court of that particular circuit should have made reference to "assumption of the risk," the reason was that there should have been a clarification of the obligations of the defendant and not merely to add into the record an affirmative defense which adds nothing by way of explanation, but merely redefines a plaintiff's right to recover even though he might have known of the existence of a defective condition in a ship.

There was no reason to give the charge as requested—the defense was not pleaded nor argued, and the obligations of the shipowner and the rights of the plaintiff were amply stated. There could be no confusion in the jury's mind as to these facts.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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